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November 16, 2009

By e-filing

Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: Finance Docket No. 35302, *Bell Oil Terminal, Inc. v. BNSF Railway Company*

Dear Chief:

Hereby transmitted is a Reply In Opposition To Motion To Dismiss, for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Bell Oil Terminal, Inc.

TMcF:kl:wp8.0\1179-B\efstb2

cc: Karl Morell, Esq.
Mr. Peter Wittich

BEFORE THE
SURFACE TRANSPORTATION BOARD

BELL OIL TERMINAL, INC.,	)	
	)	
Complainant,	)	
v.	)	FINANCE DOCKET
	)	NO. 35302
BNSF RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

REPLY IN OPPOSITION
TO MOTION TO DISMISS

BELL OIL TERMINAL, INC.
3741 South Pulaski Road
Chicago, IL 60623

Complainant

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Attorney for Complainant

DUE DATE: November 16, 2009

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SURFACE TRANSPORTATION BOARD

BELL OIL TERMINAL, INC.,	)	
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Complainant,	)	
v.	)	FINANCE DOCKET
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	)	
Defendant.	)	
	)	

REPLY IN OPPOSITION
TO MOTION TO DISMISS

Pursuant to 49 C.F.R. § 1104.13(a), Complainant BELL OIL TERMINAL, INC. (Bell Oil) hereby replies in opposition to a Motion to Dismiss Complaint (Motion) filed by BNSF Railway Company (BNSF) on October 26, 2009.

BACKGROUND

On October 6, 2009, Bell Oil filed a Complaint alleging that BNSF is violating 49 U.S.C. § 11103(a) by failing and refusing to construct, maintain, and operate, on reasonable terms, a switch connection to connect its line of railroad to a private sidetrack on Bell Oil's property.

On October 26, 2009, BNSF filed an Answer and a Motion to Dismiss the Complaint on the ground that there is no private sidetrack on Bell Oil's property to which the Board can order a switch connection. (Motion at 10).

This is Bell Oil's Reply in opposition to that Motion.

APPLICABLE DECISIONAL STANDARDS

It is provided in 49 U.S.C. § 11701(b) that "(t)he Board may dismiss a complaint it determines does not state reasonable grounds for investigation and action."

However, "a motion to dismiss is a disfavored request and (is) rarely granted in judicial and administrative proceedings." *Garden Spot & Northern Ltd. Partnership - Purch. & Oper. - Indiana RR Co. Line between Newton and Browns, IL*, embracing *Archer-Daniels-Midland Co. v. Indiana Hi-Rail Corp.*, 1992 ICC LEXIS 299 at *4 (Finance Docket No. 31953 and Docket No. 40857, decision served Jan. 5, 1993). ("*Garden Spot*").

In considering a motion to dismiss, "the Board must construe factual allegations in a light most favorable to complainant." *Sierra Pacific Power Co. v. Union Pacific R. Co.*, 1998 STB LEXIS 13 at *8 (Docket No. 42012, decision served Jan. 26, 1998), citing *Western Fuels Service Corp. v. The Burlington Northern & S.F. Ry. Co.*, Docket No. 41987, decision served July 28, 1997; *see, also, Garden Spot, supra*, 1992 ICC LEXIS 299 at *4.

A decision on a motion to dismiss is not an indication of how the case will ultimately be decided on the merits, after all the evidence is submitted. Rather, it is simply a determination of whether the factual allegations, when considered in a light most favorable to the Complainant, would provide a basis for relief. The Board dismisses complaints only when it finds that there is no basis on which it could grant the relief sought. *Grain Land Coop. v. Canadian Pacific Ltd.*, 1999 STB LEXIS 694 at *4-5 (Docket No. 41687, decision served Dec. 8, 1999).

It is premature to dismiss a complaint or petition before a complete record is developed where unique facts and issues are presented in the case, *Holrail, LLC - Construct. & Oper.*

Exempt. - in Orangeburg and Dorchester Counties, SC, 2004 STB LEXIS 668, at *5-6, (Finance Docket No. 34421, decision served Oct. 20, 2004).

RAIL TRANSPORTATION POLICY CONSIDERATIONS

The Board is guided in its regulation of the rail industry by the provisions of the Rail Transportation Policy of 49 U.S.C. § 10101. *Norfolk Southern Corp. - Control - Norfolk & W. Ry. Co.*, 366 ICC 173, 190 (1982).

Thus, a liberal interpretation of the circumstances under which a rail carrier should provide rail service to a shipper by means of a switch connection under 49 U.S.C. § 11103(a) is warranted by the Policy of § 10101(4) "to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public . . .". That Policy surely does not countenance BNSF's attempt to scuttle, or at a minimum to substantially delay, Bell Oil's good faith request to obtain the ability to ship by rail.

ARGUMENT

There are multiple grounds that compel denial of the Motion, as next explained.

1. It Cannot Be Found As A Matter Of Law That Construction Of A Private Sidetrack Must Be Completed Before A Rail Carrier Can Be Ordered To Construct A Switch Connection

As the decisional standards make clear, a Complaint is to be dismissed only if the Board finds, as a matter of law, that there is no basis on which it can grant the requested relief. Here, it cannot be found, as a matter of law, that construction of Bell Oil's private sidetrack must be completed before BNSF can be ordered to construct a switch connection. Accordingly, the Motion to Dismiss should be denied.

The governing statute, 49 U.S.C. § 11103(a), does not expressly state, nor imply, that construction of a private track must be completed before a rail carrier can be ordered to construct a switch connection. The statute provides in pertinent part as follows:

> On application of . . . a shipper tendering interstate traffic for transportation, a rail carrier . . . shall construct . . . a switch connection to connect (a) private sidetrack with its railroad (if specified standards are met) . . .

The Supreme Court did not hold that completion of a private sidetrack is a prerequisite for an order to construct a switch connection in *Cleveland, C.C. & St. L. v. United States*, 275 US 404 (1928) (referred to hereafter as the "*Big Four Case*"), cited by BNSF at page 4 of its Motion. The shipper in that case had completed construction of a private sidetrack before seeking a switch connection (*id.* at 406). The Court upheld the agency's decision that granted the shipper's request for construction of a switch connection (*id.* at 406-407). In holding that an applicant for a switch connection need not have shipped over the involved rail carrier at the time of the application, the Court stated in *dicta* that Congress safeguarded the expenditures of rail carriers by, among other things, providing that a rail carrier cannot be ordered to build the switch until after the shipper has built the private siding (*id.* at 413).

The Supreme Court cited two early Interstate Commerce Commission (ICC) decisions for that proposition: *Virginia Coal & Fuel Co. v. N. & W. Ry. Co.*, 55 ICC 61 (1919), and *Schlicher v. Director General*, 62 ICC 181 (1921).

The Supreme Court's *dicta* and the ICC decisions in those cases are explainable by reference to the wording of the switch-connection statute at that time, 49 U.S.C. § 1(9), which, unlike current 49 U.S.C. § 11103(a), was susceptible to an interpretation that the private sidetrack must have been constructed before the rail carrier could be ordered to construct a

switch connection. The Supreme Court quoted 49 U.S.C. § 1(9) in the *Big Four Case* as follows (275 US at 405, emphasis added):

> Any common carrier subject to the provisions of this Act upon application of . . . any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any . . . private sidetrack which may be constructed to connect with its railroad, where such connection is reasonably practical and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same.

The underscored phrase, "which may be constructed to connect with its railroad," strongly implies that a shipper's private sidetrack must be "constructed to connect with (a rail carrier's line of) railroad" before the rail carrier can be ordered to make such a connection. There is no such implication in the wording of the current statute. It follows from that difference that neither the language of 49 U.S.C. § 11103(a), nor the Supreme Court's decision in the *Big Four Case*, nor the early ICC decisions construing 49 U.S.C. § 1(9), warrants a finding that as a matter of law, Bell Oil's private sidetrack must be constructed before BNSF can be ordered to provide a switch connection. That being the case, BNSF's Motion to Dismiss should be denied.

Even if it were deemed to be ambiguous whether the current statute carries forward a requirement that a private sidetrack be constructed before a rail carrier can be ordered to construct a switch connection, the Rail Transportation Policy of 49 U.S.C. § 10101(4), *supra*, requires that any such ambiguity be resolved in the negative. That, too, warrants denial of the Motion.

2. The Expenditures Of BNSF In Constructing A Switch Connection Would Be Safeguarded If BNSF Were To Be Ordered To Construct A Switch Connection But Such Order Was To Be Conditioned To Provide That BNSF Need Not Actually Construct The Switch Connection Until Bell Oil's Private Sidetrack Has Been Constructed

As explained by the Supreme Court in the *Big Four Case*, the intent of Congress, in providing in former 49 U.S.C. § 1(9), that a private sidetrack be constructed before a rail carrier could be ordered to construct a switch connection was to "safeguard( ) the expenditures of the carrier." (275 US at 413). Congress did not want a carrier to go to the substantial expense of constructing a switch connection, only to have a shipper fail to construct the private sidetrack to which the connection was to be made. As BNSF put it in its Motion at pages 7 and 8, "without a sidetrack in place, the Board cannot possibly meet its responsibilities under Section 11103, since the shipper can opt not to construct the sidetrack."

However, BNSF's expenditures can be adequately safeguarded just as effectively by a provision that BNSF need not construct a switch connection until a private sidetrack is in place, as by a provision that BNSF cannot be ordered to construct a switch connection until the private sidetrack is in place. It is the actual construction of the switch connection without the private trackage in place that is a risk to a rail carrier's expenditures, not an agency order that the switch connection be constructed. Therefore, if the statutory standards are met, a rail carrier can be ordered to construct a switch connection, but its expenditures in doing so can be adequately safeguarded if it is provided in the order that the carrier need not commence such construction until the private sidetrack is completed.

It is the shipper's expenditures that are not adequately safeguarded if a rail carrier cannot be ordered to construct a switch connection until the private sidetrack is in place. In that

circumstance, the shipper is required to go to the expense of constructing a private sidetrack without knowing whether the rail carrier is going to be ordered to construct a switch connection to that sidetrack. If the application for a switch connection were to be denied, the already-constructed private sidetrack would serve no purpose and the funds expended in constructing that private track would be a total loss.

The way around that unfair and unreasonable result is to adopt a requirement that adequately safeguards the expenditures of both the rail carrier and the shipper, i.e., a provision that a rail carrier can be ordered to construct a switch connection if the statutory standards are met, but the rail carrier need not commence construction of the switch connection until after the private sidetrack is in place.

BNSF's Motion to Dismiss should be denied because it is based on a contention that BNSF cannot be ordered to construct a switch connection until Bell Oil's private sidetrack is in place, whereas BNSF's interest under the statute would be adequately protected by a condition, to which Bell Oil would agree, that BNSF need not commence construction of any switch connection that might be ordered until Bell Oil's private track is in place.

3. Even If There Were A Legal Principle That BNSF Cannot Be Ordered To Construct A Switch Connection Until Bell Oil's Private Sidetrack Is In Place, BNSF Waived The Protection Of That Principle

A waiver is a unilateral act that results in surrender of a legal right. If voluntarily surrendered, it is considered to be an express waiver. A waiver can be shown by a person's actions. A readily-understood example is that a criminal defendant surrenders the privilege against self-incrimination by choosing to testify. That action and others of the same nature are

called implied waiver. *See West's Encyclopedia of American Law*, "wavier", *see, also, FDIC v. Frazier*, 637 F.Supp. 77 (D., Kan., 1986).

If it is assumed solely for the sake of argument that under 49 U.S.C. § 11103(a) BNSF cannot be ordered to construct a switch connection until Bell Oil's private sidetrack is in place, BNSF waived the benefit of that principle when it offered to provide a switch connection at Bell Oil's Pulaski Terminal without regard to whether Bell Oil's private sidetrack was in place at the time of a Board decision ordering such connection. (Bell Oil Complaint, Paragraph XII at 5).

As will be described in more detail in the next section of Argument, BNSF was willing to go forward with a switch connection without Bell Oil's private sidetrack being in place because BNSF and Bell Oil, through their respective track engineers, had agreed, after seemingly-endless negotiations, on the exact nature and location of the switch connection and private sidetrack. There was no question on the part of either BNSF or Bell Oil that the switch connection that BNSF offered to construct would be reasonably practicable and could be made safely, and that the private sidetrack would in fact be constructed by Bell Oil.

BNSF is now seeking to disclaim its offer to Bell Oil (Motion at 7 - "BNSF is withdrawing its latest compromise plan"). However, that action comes too late to undo the legal effect of BNSF's implied waiver of any protection afforded by the legal principle. Consequently, BNSF's Motion should be denied on the ground of implied waiver.

4. Dismissal Would Be Premature Prior To Development Of A More Complete Record On Construction Of Bell Oil's Private Sidetrack

As stated in the *Holrail* case, *supra*, 2004 STB LEXIS 668 at *5-6, a complaint should not be dismissed before a complete record is made where the case involves unique facts and

issues. That principle is especially applicable here because Bell Oil has not had the opportunity to present evidence to show that its private sidetrack was effectively constructed before its Complaint was filed, nor has Bell Oil been given a chance to present evidence to rebut numerous false and misleading statements in BNSF's Motion.

Bell Oil's evidence will show that its private sidetrack was effectively constructed before its Complaint was filed. Bell Oil and BNSF had negotiated over a switch connection at Pulaski Terminal not for weeks or months, but for over 3 years. Bell Oil's track consultant and BNSF's engineering personnel had agreed on the nature and the location of the private sidetrack to be constructed on Bell Oil's property. The private sidetrack not only appeared on detailed engineering drawings, but at the most recent meeting of BNSF and Bell Oil personnel at the Bell Oil site, a panel of the sidetrack was already in place. Attached to this Reply as Appendix 1 is a photograph of that panel of trackage. The person facing the camera in that photograph is Mr. Peter Wittich, President and Chief Executive Officer of Bell Oil. The persons in the orange vests in that photograph are BNSF employees. Not long after that photograph was taken, BNSF made the offer to construct a switch connection to that track that is identified in Paragraph XII on page 5 of Bell Oil's Complaint. The Complaint was filed because BNSF refused to pay for the portion of the switch connection located on its property and refused to pay for maintenance of that portion. The point is that when the Complaint was filed, Bell Oil's private sidetrack had been completed in engineering drawings to the satisfaction of both BNSF and Bell Oil, and a panel of the sidetrack was already in place. In those circumstances, a finding is warranted that Bell Oil's private sidetrack was effectively completed when the Complaint was filed.

BNSF's engineering and operating personnel both expressly endorsed the switch connection that BNSF offered to construct. It is thus highly misleading for BNSF to claim that the connection would be "challenging" from an engineering and operating standpoint. (Motion at 5).

It is also highly misleading for BNSF to contend that the reconfiguration of tracks in the area of the Pulaski Terminal has significantly complicated service to Bell Oil's facility. (Motion at 5). Bell Oil's evidence will show that the reconfiguration actually simplified service to Bell Oil, and would have allowed such service for a small fraction of the currently estimated cost if BNSF would have complied with Bell Oil's request that the switch connection be constructed in conjunction with construction of a new connecting track as part of that reconfiguration.

Bell Oil's evidence will show that a switch connection is not at all prone to disrupt rail service on BNSF's main line. (Motion at 5).

BNSF's claim of "challenging service" to Pulaski Terminal is very much overdone. (Motion at 5-6). While there may be no local deliveries in the area, BNSF is legally required to provide interchange service with Central Illinois Railroad Company via the new connecting track near the Bell Oil facility. BNSF's "estimate( )" that "BNSF could lose nearly $4 million per year in lost container traffic due to a reduction in main line capacity as a result of serving Bell Oil" (Motion at 6), has no more validity than BNSF's preposterous claim, since abandoned, that it would cost BNSF over $4 million to construct a switch connection to Bell Oil, including $1,560,000 for four railroad crossing diamonds, when the construction would not involve the crossing of any tracks that would necessitate even one crossing diamond. (Complaint, Appdx. 1 at 5, note 2; *id.* Appdx. 3).

It is highly misleading for BNSF to claim that BNSF and Bell Oil "have had a major disagreement as to where Bell Oil's sidetrack will be located." (Motion at 6). As BNSF well knows, the parties reached agreement on the location of the sidetrack, which accounts for BNSF's offer to construct a switch connection to the sidetrack at the agreed location. Moreover, while Bell Oil had earlier requested that the private sidetrack be located on leased BNSF land because of operational benefits for both BNSF and Bell Oil, Bell Oil always openly acknowledged that BNSF had no legal obligation to lease its land to Bell Oil.

Bell Oil's evidence will refute BNSF's contention that there are ulterior motives for the requested switch connection. (Motion at 6-7). The Board's authority and expertise to determine whether the switch connection will furnish sufficient business to justify its construction and maintenance (49 U.S.C. § 11103[a][3]) afford ample protection of BNSF's interests in that respect.

BNSF contends that the Board cannot meet its responsibilities under 49 U.S.C. § 11103(a) without a sidetrack in place, "since the shipper can opt not to construct the sidetrack." (Motion at 7-8). However, as established in Section 2 of this Argument, BNSF's interests can be adequately protected if the Board authorizes construction of a switch connection, but provides that construction need not commence until the private sidetrack is in place. Indeed, that principle is necessary to adequately protect the interests of Bell Oil because otherwise Bell Oil might complete construction of the private sidetrack only to have the complaint for construction of a switch connection be later denied by the Board. That unfairness to Bell Oil would be just as objectionable as unfairness to BNSF if BNSF were to be required to construct a switch connection without the private sidetrack being in place.

BNSF's claim at page 8 of the Motion about the need for an existing private sidetrack to determine the reasonable practicability, safety, and cost of a switch connection are all contradicted by BNSF's offer to construct a switch connection regardless of whether a private sidetrack is in place. (Complaint, Paragraph XII at 5). It is evident that BNSF was satisfied as to those factors by acceptance of detailed engineering drawings of the private sidetrack and by examination of the panel of trackage in place on Bell Oil's property.

The upshot of all of the foregoing is that it would be demonstrably premature to dismiss Bell Oil's Complaint before Bell Oil has had an opportunity to submit evidence in support of the allegations of the Complaint and in rebuttal of the allegations in BNSF's Motion.

5. Any Dismissal Of The Complaint Should Be Without Prejudice To Refiling After Construct Of A Private Sidetrack

If, contrary to all of the foregoing, the Complaint is dismissed for failure to have a private sidetrack in place prior to BNSF being ordered to construct a switch connection, such dismissal should be without prejudice to refiling of the Complaint after construction of a private sidetrack. That was the result in *Virginia Coal & Fuel Co. v. N & W Ry. Co., supra*, 55 ICC at 64.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for all the reasons stated, the Motion should be denied.

Respectfully submitted,

BELL OIL TERMINAL, INC.
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Chicago, IL 60623

Complainant

Thomas F. McFarland

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Attorney for Complainant

DUE DATE: November 16, 2009

APPENDIX 1

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2009, I served the foregoing document, Reply In Opposition To Motion To Dismiss, on Karl Morell, Esq., Ball Janik, LLP, 1455 F Street, N.W., Suite 225, Washington, DC 20005, *kmorell@bjllp.com*, by e-mail and first-class, U.S. mail, postage prepaid.

Thomas F. McFarland

Thomas F. McFarland